IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Steve Weinberg, Plaintiff, vs. National Football League Players Association, Richard Berthelsen, Gene Upshaw, Tom DePaso, Trace Armstrong, Roger Kaplan, John Collins, Keith Washington, Tony Agnone, Howard Shatsky, and Mark Levin, Defendants.	§ § § § § § § § § § § § § §	Civil Action No. 3-06-CV2332-B **ECF**

NFLPA DEFENDANTS' MEMORANDUM OF LAW
IN FURTHER SUPPORT OF THEIR
MOTION TO COMPEL ARBITRATION AND TO DISMISS THE PETITION

Respectfully submitted,

Ralph I. Miller
Texas Bar No. 14105800
Aaron D. Ford
Texas Bar No. 24034445
WEIL, GOTSHAL & MANGES LLP
200 Crescent Court, Suite 300
Dallas, Texas 75201
Telephone: (214) 746-7700
Facsimile: (214) 746-7777

Jeffrey L. Kessler (*pro hac vice*)
Adam J. Kaiser (*pro hac vice*)
David Greenspan (*pro hac vice*)
Molly Donovan (*pro hac vice*)
DEWEY BALLANTINE LLP
1301 Avenue of the Americas
New York, NY 10019-6092
Telephone: (212) 259-8000
Facsimile: (212) 259-6333

Attorneys for Defendants National Football League Players Association, Richard Berthelsen, Gene Upshaw, Tom DePaso, Trace Armstrong, Mark Levin, John Collins, and Keith Washington

Dockets.Justia.com

PRELIMINARY STATEMENT

Weinberg's Opposition Brief defeats his own futile attempt to circumvent the mandatory arbitration procedures set forth in the NFLPA Agent Regulations by expressly acknowledging that the broad arbitration provision in the Weinberg-NFLPA Contract applies "to actions challenging the denial, suspension, or revocation of [Weinberg's] NFLPA certification." (See Weinberg's Opposition Brief ("Opp'n" or "Opposition Brief") at 3.) Although Weinberg tries in vain to characterize his tort claims as something other than a challenge to his decertification as an NFLPA Contract Advisor, Weinberg's Petition and his own statements to the Court belie his attempt to deny this central and essential element of each of his claims.

One need look no further than page six of the Opposition Brief to find, in a rare moment of candor, Weinberg's acknowledgement that "[t]he crux of [his] claims is that the NFLPA Defendants and others conspired to ruin his life by fraudulently setting him up for decertification." (Id. at 6 (emphasis added).) The reality is that Weinberg cannot escape the undeniable fact that the focal and essential point of each one of his tort claims is his decertification as an NFLPA Contract Advisor. Indeed, the first paragraph of Weinberg's Petition alleges that the very purpose of the Defendants' claimed conspiracy was "to immediately revoke [Weinberg's] certification as an NFLPA Contract Advisor." (Petition ¶ Introduction; see also Petition ¶ 38 ("The purpose and goal of this conspiracy was to revoke Weinberg's certification as an NFLPA Contract Advisor….").) Similarly, the only injury that Weinberg alleges in the Petition is that he was denied "past, present, and future income" as a result of being decertified. (Id.)

When Weinberg's tort claims are properly viewed as a challenge to the propriety of his decertification as an NFLPA Contract Advisor - the only proper characterization of his claims - there can simply be no question that such claims are subject to mandatory arbitration pursuant to the broad arbitration provisions in: (1) the Weinberg-NFLPA Contract; (2) the NFLPA Agent Regulations; and (3) the Weinberg-Washington Contract. (See NFLPA Defendants' Motion to Compel Arbitration and to Dismiss the Petition ("Motion") at 5-7.) Indeed, most of Weinberg's claims have already been submitted to binding arbitration in the past. (Id. at 7-11.) Weinberg offers no explanation for this fact. Nor does Weinberg, in his Opposition Brief, even attempt to deny that the three arbitration agreements at issue apply to all of the Defendants (i.e., signatories and nonsignatories alike). (Id. at 15-19.) This means that all of the claims in the Petition are arbitrable, and hence, pursuant to settled law Weinberg does not dispute, the Petition should be dismissed.

Further, the Petition must also be dismissed under Rule 9(b) because Weinberg concedes that his allegations of fraud - which underlie each of his tort claims - does not satisfy the standard of Fed. R. Civ. P. 9(b). Weinberg's promise to correct this admitted failure in the future if his remand motion is denied, (Opp'n at 12-13), is not a proper basis to maintain this action in federal court.

Weinberg's Petition is nothing but another meritless challenge to the discipline imposed upon him for his egregious violations of the NFLPA Agent Regulations. Equally frivolous is Weinberg's attempt to circumvent the broad arbitration clauses which plainly require that his claims be arbitrated – not litigated – in this or any other court.

ARGUMENT

I. THE THREE BROAD ARBITRATION AGREEMENTS APPLY TO WEINBERG'S TORT LAW CLAIMS.

Weinberg does not deny that he has entered into three separate agreements, containing three separate arbitration provisions, that are at issue herein. Rather, he incorrectly argues that these three arbitration provisions do not apply to the tort claims in the Petition. See (Opp'n at 1.)[1]

Weinberg glosses over the Weinberg-NFLPA Contract, which even Weinberg acknowledges applies "to actions challenging the denial, suspension, or revocation of [Weinberg's] NFLPA certification." (See Opp'n at 2-3.) Because, as Weinberg is forced to concede, "[t]he crux of Weinberg's claims is that the NFLPA Defendants and others conspired to ruin his life by fraudulently setting him up for decertification," the arbitration provision in the Weinberg-NFLPA Contract necessarily covers all of Weinberg's tort claims.[2] (Opp'n at 6 (emphasis added); Petition ¶¶ Introduction, 38.) The Weinberg-NFLPA Contract, standing alone, makes all of Weinberg's tort claims arbitrable.

Black v. Nat'l Football League Players Ass'n, 87 F. Supp. 2d 1 (D.D.C. 2000), is directly on point. There, former NFLPA Contract Advisor William Black made essentially the same claim against the NFLPA that Weinberg is alleging here: "the [NFLPA] unlawfully initiated disciplinary proceedings against him, affecting his livelihood as a player agent." Id. at 2 (asserting, inter alia, tortious interference claims against the NFLPA). Among other things, Black sought to circumvent the arbitration process in the NFLPA Regulations on the purported ground that the system is "inherently biased" because the arbitrator was allegedly "not neutral." Id. at 5. In rejecting Black's argument, the district court found that Black's tort claims were arbitrable pursuant to the same exact arbitration clause that appears in the Weinberg-

[1] As discussed in the Preliminary Statement, Weinberg's position is that his "claims are not subject to mandatory arbitration because he is not challenging the NFLPA's authority to decertify him or the process by which he was decertified." Opp'n at 1. That position is completely contradicted by Weinberg's own Petition. (See, e.g., Petition ¶ 38 ("The purpose and goal of this conspiracy was to revoke Weinberg's certification as an NFLPA Contract Advisor…."); ¶ Introduction (alleging that the Defendants "formed an evil cabal that conspired against [Weinberg] to immediately revoke his certification as an NFLPA Contract Advisor….").)

[2] That provision states, in relevant part: "I agree that if I am denied certification or if subsequent to obtaining certification it is revoked or suspended pursuant to the Regulations, the exclusive method for challenging any such

NFLPA Contract. Id. Weinberg's tort claims, which are similar to Black's, are also covered by the plain language of this broad arbitration clause.

The second arbitration agreement which compels arbitration of Weinberg's claims, the NFLPA Agent Regulations, provides that arbitration is the exclusive method for resolving "any and all disputes that may arise from…[a]ny other activities of a Contract Advisor."[3] (Motion at 6, App. at 24 (emphasis added).)[4] Although this clause is as broad as the English language will permit, Weinberg argues that it does not cover his tort claims. (See Opp'n at 4, 6.) But that is wrong. Weinberg's tort claims certainly "arise from" his "activities [as] a Contract Advisor."[5] Indeed, this entire case is, according to Weinberg, about his Contract Advisor decertification. Hence, Weinberg's claims fit squarely within the literal meaning of this broad arbitration clause.

Moreover, it is axiomatic that broad arbitration clauses – such as the "any and all dispute" provision in the NFLPA Agent Regulations – "are not limited to claims that literally arise under the contract, but rather embrace all disputes having a significant relationship to the contract."[6] Sharju Ltd. P'ship v. Choice Hotels Int'l, Inc., No. Civ.A.3:01-CV-2605-X, 2002 WL 107171, at *2 (N.D. Tex. Jan. 22, 2002) (emphasis added) (referring to arbitration a tortious interference claim that was "rooted in" the parties' contract) (attached to the Declaration of

---

action is through the arbitration procedure set forth in the [NFLPA Agent] Regulations." (Mot. at 6, Ford Aff. at Ex. 1.)

[3] All Contract Advisors must agree – as Weinberg did – to be bound by the NFLPA Agent Regulations. (See Motion, App. at 5.)

[4] All citations to "App." refer to the Appendix in Support of NFLPA Defendants' Motion and Brief in Support of Their Motion to Compel Arbitration and to Dismiss the Petition.

[5] (See e.g., Petition, at ¶¶ 16-18, 40 (alleging Weinberg's tenure and activities as a Contract Advisor); 41-55 (alleging Weinberg's activities as a Contract Advisor in connection with the disciplinary complaints filed against him), 85-89 (alleging Weinberg's attempts to collect fees he purportedly earned as a Contract Advisor).)

[6] "Any dispute" clauses are the broadest type of arbitration clause. See, e.g., Rojas v. TK Comms., Inc., 87 F.3d 745 (5th Cir. 1996); In re Compl. of Hornbeck Offshore Corp., 981 F.2d 752 (5th Cir. 1993).

Aaron D. Ford ("Ford Aff."), Ex. 1). Where, as here, the arbitration clause is broad, the factual allegations underlying a tort claim need only "touch matters" covered by the contract for the claim to be arbitrable. Waste Mgmt., Inc. v. Residuos Industriales Multiquim, 372 F.3d 339, 344 (5th Cir. 2004) (emphasis added). This modest standard, which reflects the strong federal policy in favor of arbitration, is easily satisfied by the arbitration clause in the NFLPA Agent Regulations (as well as the two other arbitration provisions at issue in this case).

Moreover, "[e]ven 'narrow' arbitration clauses" – which the "any and all dispute" arbitration clause in the NFLPA Agent Regulation is not – "may encompass claims other than for breach of contract." VDV Media Corp. v. Relm Wireless, Inc., No. 3:05-CV-1877-H, 2006 WL 462436, at *2 (N.D. Tex. Feb. 27, 2006) (Ford Aff., Ex. 2). For example, in VDV Media Corp., this Court held that a claim for tortious interference is subject to arbitration where the contract "provides the sole basis by which Plaintiff was entitled to" the business with which the defendant allegedly interfered. Id. The controlling principle is simple: tort claims that spring from the parties' contractual relationship are arbitrable. See, e.g., FCI v. Tyco Electronics Corp., No. 2:06-CV-128 (TJW), 2006 WL 2037557, at *2 (E.D. Tex. July 28, 2006) (the test in the Fifth Circuit is whether the "relationship set forth in the contract gives rise to the claims") (Ford Aff., Ex. 3); see also, Harvey v. Joyce, 199 F.3d 790, 795 (5th Cir. 2000). Here, Weinberg's tort claims spring from the suspension of his certification as an NFLPA Contract Advisor. Those claims are arbitrable because they depend upon the NFLPA Agent Regulations, his contract with the NFLPA pursuant to which Weinberg received his certification, and his contract with Washington that was the alleged object of the tortious interference.[7]

[7] As will be set forth in the NFLPA Defendants' Opposition to Plaintiff's Motion to Remand, which will be filed on March 6, 2007, absent such certification, Weinberg would have no right under federal labor law or under the NFL Collective Bargaining Agreement to represent NFL players in their negotiations with NFL Clubs.

Stated another way, without these contracts, Weinberg would not have enjoyed the relationships upon which his claims are based, and that fact, standing alone, makes these claims arbitrable.

This controlling principle of law answers Weinberg's rhetorical question, "what if [NFLPA Defendant] Berthelsen had … punched Weinberg in the face? Would Weinberg's claim for assault be subject to arbitration?" (Opp'n at 4.) Of course not, because Weinberg's hypothetical battery claim would exist independent of his status as a Contract Advisor and the NFLPA Agent Regulations. Weinberg would have a battery claim against anyone who punched him in the face, whether or not he was a Contract Advisor. In stark contrast, however, Weinberg would have no claim for an alleged tortious conspiracy "to ruin his life by fraudulently setting him up for decertification and by tortiously interfering with his right to receive income under existing player contracts," if not for Weinberg's certification as a Contract Advisor, his agreement to abide by the NFLPA Agent Regulations, and his contracts with NFL players. Weinberg's "battery" hypothetical misses the mark.[8]

With respect to the third applicable arbitration clause – the broad clause in the Weinberg-Washington Contract requiring arbitration of "any and all disputes…involving the meaning, interpretation, application, or enforcement of this Agreement or the obligations of the parties under this Agreement" – Weinberg dismissively declares the clause to be "narrow" and inapplicable because he is "not alleging a claim that requires any interpretation, application, or enforcement of the Washington Contract." (Opp'n at 3.) Weinberg is wrong again. The clause is broad, not narrow.[9] And Weinberg admits that his tort claims in fact allege intentional interference with "Weinberg's right to receive payments under [the Weinberg-Washington Contract]." (Id. (emphasis added).) Thus, by his own admission, Weinberg's claims are indeed related to the Weinberg-Washington Contract. (See Motion, App. at 64-66.) Weinberg's claims, in any event, certainly "touch upon" the Weinberg-Washington Contract, which Weinberg claims was an object of an alleged tortious interference, and hence, under settled legal principles, Weinberg's claims are arbitrable. See, e.g., Waste Mgmt., 372 F.3d at 344; Sharju Ltd. P'ship, 2002 WL 107171, at *2.[10]

---

[8] This is also why Weinberg's reliance on Brown v. Nat'l Football League, 219 F. Supp. 2d 372 (S.D.N.Y. 2002), is inapposite. (See Opp'n at 9.) In Brown, an NFL player asserted tort claims against the NFL after an NFL referee negligently injured Brown. The court determined that Brown's claims were not arbitrable because Brown was claiming a breach of a duty owed to the general public. In other words, anyone injured by the negligence of an NFL referee could bring a negligence claim against the NFL, not just an NFL player. Id. at 382. Brown's claims were thus unrelated to the parties' contractual relationship. Weinberg's reliance on the Texaco and Dusold cases are inapposite for the same reason. See Texaco, Inc. v. Am. Trading Transp. Co., 644 F.2d 1152 (5th Cir. 1981) (plaintiff's claim was unrelated to the parties' contractual relationship); Dusold v Porta-John Corp., 807 P.2d 526 (Ariz. Ct. App. 1990) (same).

Rather than come to grips with the controlling Fifth Circuit authority relied upon by the NFLPA Defendants, Weinberg devotes six pages of his Opposition Brief – nearly half of his brief – to discussing a seemingly random assortment of inapposite cases from other jurisdictions. (See Opp'n at 7-12.) For example, Weinberg prominently relies upon Old Dutch Farms, Inc. v. Milk Drivers & Dairy Employees Union, 359 F.2d 598 (2d Cir. 1966), and Fuller v. Guthrie, 565 F.2d 259 (2d Cir. 1977), two Second Circuit cases from the 1960s and 1970s, for a proposition that was overruled seven years ago. Interstate Brands Corp. v. Bakery Drivers & Bakery Goods Vending Machines, Local Union No. 550, 167 F.3d 764, 769 (2d Cir. 1999) ("since Old Dutch was decided the Supreme Court has repeatedly held that a party to a contract

[9] A dispute "involving" a contract is the most expansive type of arbitration clause. "[T]he word 'involving' is the functional equivalent of the words 'relating to.'" PPG Indus., Inc. v. Pilkington PLC, 825 F. Supp. 1465, 1478 (D. Ariz. 1993); see also Bhd. of Teamsters & Auto Truck Drivers Local No. 70 v. Interstate Distributor Co., 832 F.2d 507, 510 n.2 (9th Cir. 1987).

[10] See also Snap-on Tools Corp. v. Mason, 18 F.3d 1261, 1265 (5th Cir. 1994) ("[b]ecause the tort claims all arise out of the business relationship between the opposing parties, it appears that they are arbitrable…"); Francisco v. Stolt Achievement MT, 293 F.3d 270, 278 (5th Cir. 2002) (referring tort claims to arbitration pursuant to an agreement covering all claims "arising from this employment.").

who has a federal statutory claim may be limited to an arbitral forum even though the agreement requiring arbitration of that claim did not contain a 'clear, explicit statement' to that effect").[11]

Moreover, Weinberg argues that his claims are not arbitrable because they are "intentional" tort claims. (See Opp'n at 5.) But as the litany of cases compelling arbitration of intentional tort claims relied upon by the NFLPA Defendants make clear, see supra at 5-7, Weinberg's position is erroneous. See, e.g., Ascension Orthopedics, Inc. v. Curasan AG, No. A-06-CA-424 LY, 2006 WL 2709058, *3-4 (W.D. Tex. Sept. 20, 2006) (holding that "the mere pleading of tort claims does not preclude the application of the arbitration clause," and that plaintiff's claims were arbitrable because the factual allegations underlying the claims "touch[ed] upon" matters covered by the arbitrable contract) (Ford Aff., Ex. 4). In sum, under the controlling Fifth Circuit law that Weinberg ignores in his Opposition Brief, there can be no question that the three broad arbitration agreements at issue here govern all of Weinberg's tort claims in this action. See, e.g., Sharju Ltd. P'ship, 2002 WL 107171, at *2.

II. THE ARBITRATION CLAUSES APPLY TO ALL DEFENDANTS.

The NFLPA Defendants' Motion establishes that, pursuant to contract, agency, and estoppel principles, Weinberg's claims against all of the Defendants – including both signatories and nonsignatories to the three arbitration agreements – are arbitrable. (See Motion at 15-19.)[12] Weinberg's Opposition Brief does not dispute this settled law.

[11] See also Greenwood v. Sherfield, 895 S.W.2d 169, 174 (Mo. App. S.D. 1995) (relying on Old Dutch and Fuller for a proposition since overruled in the Second Circuit); Chassereau v. Global-Sun Pools, Inc., 611 S.E.2d 305, 308 (S.C. App. 2005) (deciding under South Carolina state law, not the FAA, that a homeowner is not required to arbitrate defamation claims against a pool installation company); Radzievsky v. MacMillan, 170 A.D.2d 400, 400 (NY. App. Div. 1991) (noting in dicta that New York state law does not require an employee to arbitrate the question of whether he was fraudulently induced to enter an employment agreement); Dean Witter Reynolds Inc. v. Ness, 677 F.Supp. 866, 870 (D.S.C. 1988) (holding, in support of the position of the NFLPA Defendants, that "the phrase 'arising out of employment or termination of employment' requires arbitration of disputes, both tort and contract, which involve significant aspects of the employment relationship") (emphasis added).

[12] See also Sims v. Hendrickson, No. A096719, 2002 WL 1988154, at *4 (Cal. Ct. App. Aug. 28, 2002) (holding that a Contract Advisor is equitably estopped from avoiding arbitration with a nonsignatory defendant where claims made against a signatory to the Agent Regulations are "based on the same facts and are inherently separable" from

IIII. THE PETITION SHOULD BE DISMISSED.

Weinberg concedes the well-settled rule that a court may "dismiss the case if all of the issues raised before the district court are arbitrable." (Opp'n at 12 n.40 (emphasis in original).) Because, as set forth in Points I and II, supra, all of Weinberg's claims are arbitrable, the Petition should be dismissed. Weinberg also recognizes that if he is compelled to arbitrate only some of his claims, then the remaining claims should be stayed. (Opp'n at 12 ("[I]f the Court believes that the parties have agreed to arbitrate the claims presented in the Petition, Weinberg respectfully requests that the Court stay this action ….").)

IV. ALL OF WEINBERG'S FRAUD CLAIMS SHOULD BE IMMEDIATELY DISMISSED PURSUANT TO RULE 9(B).

Finally, Weinberg admits that all of his fraud claims do not meet the particularity requirements of Federal Rule 9(b). (Opp'n at 13 ("If proper jurisdiction is in this Court, then Weinberg respectfully requests that he be allowed to replead his claims to the standards of Rule 9(b) …").) Weinberg fails to recognize that the Petition must meet the requirements of Rule 9(b) even though he initially filed it in state court. See, e.g., Redwood Resort Props., LLC v. Holmes Co. Ltd., No. 3:06-CV-1022-D, 2006 WL 3531422, at *12 (N.D. Tex. Nov. 27, 2006) (rejecting plaintiff's argument that a lawsuit first filed in state court need not comply with the requirements of Rule 9(b), and granting defendant's motion to dismiss) (Ford Aff., Ex. 5); Am. Realty Trust, Inc. v. Travelers Cas. & Sur. Co. of Am., 362 F. Supp. 2d 744, 748 (N.D. Tex. 2005) (dismissing fraud claim despite plaintiff's argument that the claim did not comply with 9(b) because it was first filed in state court). Each of Weinberg's tort claims depends upon an allegation of fraud and, therefore, must be dismissed under Rule 9(b).

---

claims made against the nonsignatory).

CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in the NFLPA Defendants' Motion, the NFLPA Defendants respectfully request that this Court compel arbitration and dismiss the Petition, or in the alternative, compel arbitration and stay any remaining claims. Further, this Court should dismiss all of Weinberg's fraud claims pursuant to Rule 9(b).

Dated: March 1, 2007

Respectfully submitted,

s/ Ralph I. Miller

Ralph I. Miller
Texas Bar No. 14105800
Aaron D. Ford
Texas Bar No. 24034445
WEIL, GOTSHAL & MANGES LLP
200 Crescent Court, Suite 300
Dallas, Texas 75201
Telephone: (214) 746-7700
Facsimile: (214) 746-7777
ralph.miller@weil.com
aaron.ford@weil.com

Jeffrey L. Kessler (*pro hac vice*)
Adam J. Kaiser (*pro hac vice*)
David Greenspan (*pro hac vice*)
Molly Donovan (*pro hac vice*)
DEWEY BALLANTINE LLP
1301 Avenue of the Americas
New York, NY 10019-6092
Telephone: (212) 259-8000
Facsimile: (212) 259-6333
jkessler@deweyballantine.com
akaiser@deweyballantine.com
dgreenspan@deweyballantine.com
mdonovan@deweyballantine.com

ATTORNEYS FOR THE NFLPA DEFENDANTS

CERTIFICATE OF SERVICE

On March 1, 2007, I electronically transmitted the foregoing document using the ECF system for filing and transmittal of a Notice of Electronic Filing to those parties registered for ECF in this case. I further certify that the foregoing document was served on all counsel of record by ECF.

s/ Aaron D. Ford
Aaron D. Ford